# Petition

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81-1118
NO. ———

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

———

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, LOCAL 342; and THE PATTERNMAKERS LEAGUE OF BIRMINGHAM,
Petitioners,

v.

JOSEPH TERRELL, JR., WALTER DUDLEY, THOMAS GREEN, JOHNNY LONG, ALBERT MASON, MARCUS OAKES, SAM WALKER, et al.,
Respondents.

———

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly applied *Teamsters* v. *United States* to find no bona fide seniority system, where the system had its genesis in racial discrimination and a disparate impact on racial minorities, and the Court viewed the totality of the facts of the case including facts unrelated to the negotiation and maintenance of the system to infer an intention to discriminate therein.*

2. Whether the Court of Appeals correctly applied *Teamsters* v. *United States* to find no bona fide seniority systems as to the Molders and Patternmakers, when it considered the five separate union contract seniority systems with an employer to constitute one seniority system and then relied upon one or more major factors to find an intention to discriminate that did not involve either the Molders or the Patternmakers.

3. Whether the Court of Appeals failed to apply the Federal Rule of Civil Procedure Rule 52(a) "clearly erroneous" rule to the District Court's findings of fact to find intention to discriminate under Section 703(h).**

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* On this issue, certiorari has been granted in *Swint* v. *Pullman-Standard Company*, Nos. 80-1190 and 80-1193, and petition for certiorari has been filed in *U.S.* v. *Georgia Power Co.*, No. 80-2117.

** On this issue, certiorari has been granted in *Swint*, No. 80-1193.

## LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties to this proceeding in the Court of Appeals:

United Steelworkers of America, AFL-CIO, and United Steelworkers of America, Local 2140;

Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, and its Local 583;

International Association of Machinists and Aerospace Workers, and its Local Lodge 359;

International Molders and Allied Workers Union;

The Patternmakers League of North America;

"all black persons who have at any time after March 24, 1969 (or who may hereafter be) employed as production and maintenance employees at the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company," a class for which the named plaintiffs were certified as representatives; and

The Equal Employment Opportunity Commission, *Amicus Curiae.*

In the District Court, the United States Pipe and Foundry Company, a subsidiary of Jim Walter Resources, Inc., was a party defendant.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The International Molders and Allied Workers Union, AFL-CIO, Local 342 and the Patternmakers League of Birmingham, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Joseph Terrell, et al.* v. *United States Pipe & Foundry Co., et al.*, entered on May 14, 1981.

## OPINIONS BELOW

The opinion of the District Court is reported at 22 FEP Cases 1695 (M.D. Ala. 1979) and is reprinted in the separate Appendix to Petition for a Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit filed by the International Association of Machinists and Aerospace Workers, AFL-CIO and Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, herein referred to as "The Appendix" or (App. ——), and herein App. B (1b-27b).* The opinion of the Court of Appeals is reported at 644 F.2d 1112 (CA 5, 1981), and is reprinted as Appendix A (1a-31a).

## JURISDICTION

The Court of Appeals entered judgment on May 14, 1981. App. C (1c-2c). Timely Petition for Rehearing was denied on August 7, 1981. App. D (1d-2d). On October 19, 1981, Mr. Justice Powell extended the time for filing this Petition to and including December 7, 1981. (Appendix attached to this Petition.) This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

## STATUTES AND RULE INVOLVED

The pertinent parts of Sections 703(a), (c) and (h) and 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a), (c) and (h), and -5(g); of the Civil Rights Act of 1866, 42 U.S.C. § 1981; and of Rule 52(a), F.R.Civ.P., are reprinted in an Appendix in the back of this Petition.

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* This is to emphasize that Petitioners are utilizing the Appendix of the Petition for Writ of Certiorari of the Machinists and Boilermakers.

## STATEMENT OF THE CASE

In 1972, Respondents brought a class action employment discrimination suit on behalf of themselves and other black employees of the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company. Jurisdiction in the District Court was based upon Section 703 of the 1964 Civil Rights Act [42 U.S.C. § 2000e-(c)] and 42 U.S.C. § 1981. The action was brought against their employer, U.S. Pipe and Foundry Company and six local Unions, Local 2140, United Steelworkers of America ("Steelworkers"); Local 342, International Molders and Allied Workers Union ("Molders"); Patternmakers Association of Birmingham ("Patternmakers"); Lodge 359, International Association of Machinists and Aerospace Workers ("IAM"); Local 583, Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers ("Boilermakers"); and Local 136, International Brotherhood of Electrical Workers ("IBEW"); and the International Unions with which they were affiliated. Summary judgment was granted in favor of the IBEW Union. A settlement was reached before trial by all parties on amendments to the seniority system and affirmative relief. Settlement was also reached between the Plaintiffs and the Company on money issues.

After a trial on the liability issues against the remaining Unions, the District Court found for the International and Local Unions except Machinists Local Lodge 359 and Boilermakers Local 583 (App. B, 25b).

The District Court entered a Rule 54(b) certificate (App. J, lj) that there was no just reason for delay and directed entry of final judgment in favor of all Unions, except Locals 359 and 583, and final judgment was entered (App. K, lk) from which Plaintiff appealed. An Order dismissing all claims against Machinists Local Lodge 359 and Boilermakers Local 583, except those arising from the 1950 transfer of employees, was entered (App. L, 1L) and the District Court issued

a certificate pursuant to 28 U.S.C. § 1292(b) that the legality of the seniority system involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation (App. M, lm). Plaintiffs' application for permission to appeal was granted by the Fifth Circuit.

The Fifth Circuit reversed the District Court's holding that the seniority system was bona fide. The Court affirmed the District Court's holding that the International Unions were not liable because they were insufficiently identified by the EEOC charges. The Court also held that the Steelworkers bore no legal responsibility for the discriminatory seniority system (App. A, 9a).

### A. Facts

From 1900 to 1938, the Molders, Local 342 and the Patternmakers Association of Birmingham as well as the International Organization of Machinists had negotiated with the management of the Bessemer plant of U.S. Pipe, but were not successful in negotiating a collective bargaining agreement. On April 14, 1938, the Company recognized each of five American Federation of Labor Unions, the Molders, Patternmakers, Machinists, Boilermakers and Electricians as collective bargaining representatives of its members employed at the Bessemer Plant (App. F, 9f). The Patternmakers admitted to membership Patternmakers and Patternmakers apprentices. The Molders Local 342 admitted to membership all employees of the plant except those employees eligible for membership in the four AFL Unions (App. F, 5f).

In 1939, the Steelworkers' Organizing Committee sought to represent all production and maintenance employees. The Molders also sought a unit of all craft Molders and all other production and maintenance employees excluding those craft employees represented by other AFL craft Unions. The pro-

duction and maintenance employees sought by the Molders and Steelworkers were predominantly black.

In the 1940 election, the Patternmakers, Machinists, Boilermakers and Electricians had sought to represent employees skilled in their respective crafts. The Steelworkers also claimed these crafts. The four AFL Unions defeated the Steelworkers in this aspect of the election. These craft units were predominantly or totally white.

The Molders lost the 1940 NLRB self-determination election to the Steelworkers (App. A, 10a). Having lost the election in which it sought to represent a clearly racially integrated unit, the Molders ended up in 1939 with no representative status at all.

In the next 9 years, the Steelworkers consolidated their hold in the existing production and maintenance units. Therefore, in 1949, the Molders successfully sought to represent a unit of their craft in what is known as a "craft severance" election. The National Labor Relations Board, consistent with the standards set out in the 1947 Taft Hartley Act amendments, found that molders, coremakers and their apprentices were highly skilled mechanics who underwent a four year apprenticeship before being qualified for their position and that they constituted an appropriate craft unit for a "craft severance" election (App. H, 3h).

Each Union negotiated its own seniority system for the employer it represented. These systems were substantially similar and conformed to the pre-existing operational units of employees which had been established by U.S. Pipe.

In 1950, the Boilermakers, Machinists, Steelworkers and the Company agreed to alter Union jurisdiction over certain positions (App. B, 19b). *The Molders and Patternmakers were in no way involved in these agreements* (App. B, 26b).

In the mid 1960's, due to manufacturing changes, the Mold-

ers added the Group II Molder position which included black Molder Helpers (App. B, 19b).

In 1972, the General Foundry and the Pattern shop was closed. Thereafter the Patternmakers and the Molders ceased to represent any employees at the Bessemer plant (App. B, 10b).[1]

There is no question that the craft Union and industrial Union racial alignments reflected racial patterns of the South in the relevant time periods. The craft Unions were predominantly or totally white and the Steelworkers unit was predominantly black.

### B. The District Court Decision

The District Court found that the evidence established a history of racial discrimination by the company and that the seniority system had a discriminatory impact upon black employees (App. B, 11-12b). It limited the liability of the Molders International to the period from Ocober 4 to October 31, 1971.

The District Court then examined the defense that the seniority systems were bona fide and thus immune from liability under the four standards determined by *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978). The Court found that *the seniority system was facially neutral because the limitations on transfer applied to both blacks and whites* (App. B, 14b). The Court further held that, with the exception of the positions involved in the 1950 inter-union transfers, the bargaining units and in turn the seniority units were rational and in accord with NLRB precedents and common industry practice (App. B, 20b).

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[1] The District Court noted that but for the closing of the department in 1972, the alignment which included helpers might have provided a route by which blacks would have progressed into craft positions (App. B, 19-20b).

Under the heading, "Genesis of the Seniority System", the District Court found that although the seniority system was instituted at the time of widespread racial discrimination, this factor alone does not mean that the seniority system falls outside of the immunity of Section 703(h) (App. B, 21b).

The Court further held that the seniority systems had been negotiated and maintained free of discriminatory purpose. It concluded that in each instance the system was adopted for other than racial reasons such as protection against competition from other white craftsmen (App. B, 22b).

The District Court concluded that the system was bona fide with the exception of the transfer of certain jobs in 1950 between seniority units (App. B, 25b). It ordered a second stage of the trial to determine the liability of IAM Lodge 359 and Boilermakers Local 583 (App. B, 27b).

Both the District Court and the Court of Appeals continuously referred to the Bessemer "seniority system" as though it was in fact one "system". In fact, as the District Court found separate collective bargaining agreements, and recognized the individual character of each in dismissing allegations against the Unions, it was actually finding separate seniority "systems" that were bona fide under § 703(h). The Fifth Circuit, however, obviously considered those seniority systems to be one integrated "system", and erroneously utilized the characterization to make erroneous conclusions throughout its decision.

### C. The Court of Appeals Decision

The Fifth Circuit Court of Appeals refused to extend the § 703(h) immunity to the Defendant Unions. It found evidence of discriminatory intent under the *James* factors and the totality of the circumstances (App. A, 18a). One primary source of evidence was the 1950 "swap" between some of the Unions to which neither the Molders or the Patternmakers were a party.

The Fifth Circuit also disregarded the District Court's finding of fact that the system was neutral because it was applied equally to blacks and whites. Following *Swint* v. *Pullman Standard*, 624 F.2d 525 (5th Cir. 1980), the Court held that disparate impact can conclusively resolve the "equality" factor in favor of those who had suffered such discrimination (App. A, 19a).

The Court took judicial notice of general discriminatory policies of some craft Unions which it said offered evidence of racial motivations underlying the seniority system (App. A, 20a). The Court found error in the failure of the District Court to recognize the cumulative effect of separate pieces of evidence of racial motives to prove that the seniority system had its genesis in racial discrimination (App. A, 20a).

In addition, the Court of Appeals absolved the Steelworkers from any responsibility under Title VII for the seniority system (App. A, 25a). It also upheld the decision of the District Court that no liability of the Internationals under Title VII should commence until 180 days prior to the 1973 amended charges (App. A, 31a).

## REASONS FOR GRANTING THE WRIT

### I. The Court Of Appeals Decision Is In Conflict With Decisions Of This Court And With Those Of Other Circuits.

In *Teamsters* v. *U.S.*, 431 U.S. 324 (1975), the Court held that the adverse impact upon racial minorities of a bona fide seniority system established prior to the passage of Title VII will not be a violation of the Act, provided the seniority system was not established or maintained with the purpose to discriminate because of race.

Although the seniority system may perpetuate the past effects of pre-Act discrimination, § 703(h) of the Act will im-

munize the employer and the Union establishing and maintaining the seniority system from liability, absent a showing of discriminatory intent.

In *Teamsters*, the seniority system in question was conceded not to have been established and maintained with an illegal purpose. Therefore the Court did not specifically set forth the tests to be used in determining whether a seniority system was established or maintained with discriminatory intent.

The Fifth Circuit in *James* v. *Stockham Valves & Fitting Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), held that "the totality of the circumstances in the development and maintenance of the system is relevant to examining" the issue of purposeful discrimination.

The *James* court suggested that four factors were relevant to determine the totality of the circumstances, *i.e.*:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

(3) whether the seniority system had its genesis in racial discrimination; and

(4) whether the system was negotiated and has been maintained free from discriminatory purpose.

Finally the *James* court found that the determination of the bona fide character of a pre-Act seniority system is to be made on a case by case basis; "the facts of a particular seniority unit are critical to a determination whether the system is bona fide".

The Fifth Circuit, after *James*, found that a conscious intent to discriminate in the establishment and maintenance of

a seniority system, is not necessary where the system had its genesis in racial discrimination, *Swint* v. *Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980), or where the adverse impact on racial minorities demonstrates a discriminatory purpose, *United States* v. *Georgia Power Co.*, 634 F.2d 929 (5th Cir. 1981).

Certiorari has been granted in *Swint*, Nos. 80-1190 and 80-1193. Petition for a Writ of Certiorari is pending in *Georgia Power*, No. 80-2117.

The Fifth Circuit, in finding the petitioner's seniority systems not to be bona fide under § 703(h), relied upon *Swint* and *Georgia Power*, and held that "disparate impact constitutes not only relevant evidence of discriminatory purpose, but can conclusively resolve the 'equality' factor in favor of those who have suffered from such discrimination" (App. A, 19a).

The Fifth Circuit also refused to limit the scope of the application of the District Court's finding about the 1950 "swap" of bargaining unit jobs to that period. Instead, it found this to be evidence of purposeful discrimination in the negotiation and operation of the system and in the process attributed the "overtly discriminatory policies" of the Machinists and Boilermakers Unions to the Petitioners. The Court considered the 1950 "swap" of bargaining unit jobs between the Steelworkers, Machinists and Boilermakers, and used this circumstance to bolster its conclusion that the Petitioners' seniority systems were established and maintained with the purpose to discriminate, although the Petitioners were not parties to the "swap" (App. A, 18a).

With regard to the Petitioners the Court singled out the fact that the Petitioner Molders had segregated locals at other plants in Alabama, although not at the Bessemer facility, and that the Petitioner Patternmakers had made a racial slur against blacks.

In sum, the Fifth Circuit's finding that the Petitioners' seni-

ority systems were not bona fide was based on the following factors:

(1) at the time the systems were established the employer was engaging in racially discriminatory employment practices;

(2) the Petitioners' seniority systems had an adverse impact on black employees;

(3) other Unions at the employer's facility, in the operation of their separate seniority systems, engaged in discriminatory practices in 1950;

(4) other Unions at the employer's facility had overtly discriminatory racial policies;

(5) the Petitioner Molders had segregated locals in other locations in Alabama, although not at the Bessemer location; and

(6) the Petitioner Patternmakers made a racial slur against blacks.

The essential question upon which the Petitioners seek review is the proper standard to be applied in determining the bona fide character of pre-Act seniority systems.

The approach of the Fifth Circuit in this case, as well as *Swint* and *Georgia Power* has been not to require a conscious intention to discriminate to disqualify a seniority system from the protection of § 703(h). Rather, the Circuit has found in effect that where a seniority system had its genesis in racial discrimination and has an adverse impact upon racial minorities, the system loses its bona fide character. In other words, if there is "genesis" then the parties must change the system. Any system whose beginnings are rooted in a time period of discrimination will reflect the effects of that discrimination. That is, white workers in an all white classification will be protected by a bona fide seniority system. This will have a disparate impact on non whites until the original whites die off or leave their positions. Fifth Circuit

tests would force changes in the system contrary to § 703(h) protections.

In *Teamsters, supra,* the Supreme Court rejected the argument that no seniority system that perpetuates pre-Act discrimination can be bona fide. Based on the legislative history of the Act the Court concluded that the "disparate impact" test of *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), should not be applied to pre-Act seniority systems. This conclusion was based on § 703(h) of the Act immunizing bona fide pre-Act seniority systems unless those systems were the result of an intention to discriminate because of race. See also, *T.W.A.* v. *Hardison,* 432 U.S. 63 (1977); *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979); *Washington* v. *Davis,* 426 U.S. 229 and *Mobile* v. *Bolden,* 446 U.S. 55 (1980).

In *Teamsters,* the Court's dictum indicated that the seniority system in question did not have its genesis in racial discrimination. The Fifth Circuit has taken this dictum to imply that where the seniority system had its genesis in racial discrimination it loses its immunity under § 703(h).

This approach completely ignores the Court's holding in *Teamsters* that:

> To accept the argument (disparate impact) would require us to hold that a seniority system becomes illegal simply because it allows the full exercise of pre-Act seniority rights of employees of a company that discriminated before Title VII was enacted . . . The consequences would be a perversion of the congressional purpose.

Thus, the Court recognized that many pre-Act seniority systems will have their genesis in pre-Act discrimination, and this fact will not serve to make a facially neutral system illegal.

In spite of these Supreme Court pronouncements, the Fifth

Circuit has held that the fact that a system which had its genesis in pre-Act discrimination, coupled with a showing of disparate impact is sufficient evidence to demonstrate illegal purpose, absent direct evidence of purposeful discrimination (App. A, 20a).

This holding is in conflict with interpretations in the Fourth, Sixth and District of Columbia Circuits. In *Carroll* v. *Steelworkers*, 498 F.Supp. 976, 989 n.9 (D. Md), *aff'd per curiam* 639 F.2d 778 (4th Cir. 1980), the court specifically rejected the theory that discriminatory intent may be inferred from disparate impact. Instead it followed this court's holding in *Personnel Administration* v. *Feeney*, 442 U.S. 256, 279 (1979), that discriminatory purpose implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its effects upon an identifiable group. 498 F.Supp. at 989. The Fourth Circuit affirmed, indicating that its interpretation of "intent" in *Teamsters* reflected that of the District Court. 639 F.2d 778 (4th Cir. 1980).

The Sixth Circuit also followed *Teamsters* in finding that a system was not established or maintained with the intent to discriminate. Although it had a disparate impact, the system applied equally to all races. *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1378 (6th Cir. 1977). Unlike the Fifth Circuit, the Sixth did not infer intent or lack of neutrality from the disparate impact. Other Circuits are in at least tacit agreement with the Fourth Circuit's interpretation of intent to discriminate. *Hilton* v. *Wyman-Gordon Co.*, 624 F.2d 379 (1st Cir. 1980), and *U.S.* v. *Trucking Employers, Inc.*, 561 F.2d 313, 319 (D.C. Cir. 1977).

The net effect of the Fifth Circuit's standard is to nullify *Teamsters* and § 703(h) of the Act, and to reintroduce the *Griggs* v. *Duke Power* standard to pre-Act seniority systems.

The Circuit's "totality of circumstances" test sweeps so broad as to include such irrelevant matters as the conduct of

other Unions, the actions of the Petitioners at other locations and isolated remarks made by representatives of the Petitioners outside the context of the seniority system. Such a test is so vague as to make virtually every pre-Act seniority system illegal, despite *Teamsters* and § 703(h).

Although the Supreme Court overruled the Fifth Circuit in *Teamsters*, were that case to be before the Fifth Circuit again, under the "totality of the circumstances" test, it is most likely the Fifth Circuit would again find the seniority system illegal.

In *Teamsters*, there was pre-Act discrimination by the employer as well as disparate impact upon racial minorities. Taking these factors into consideration, the "totality" test would lead one to the conclusion that the system was illegal, contrary to the holding of the Supreme Court.

It is important for the Court to review whether the standards applied in the Fifth Circuit are eroding the holding in *Teamsters* and the congressional mandate of § 703(h). The Court should also review the split in the Circuits as to the factors involved in a "bona fide" seniority system and the meaning of "intention to discriminate" in § 703(h).

## II. With Particular Regard To The Molders And The Patternmakers The Court of Appeals Decision Is In Conflict With Decisions Of This Court; With Decisions Of Other Circuits And With National Labor Policy Insofar As It Relies Upon One Or More Major Factors To Find An Intention To Discriminate That Involved Unions Other Than The Molders And The Patternmakers.

During the period of at least 1939 to 1964 (the relevant period for determining the bona fide character of pre-Title VII seniority systems) the employees at U.S. Pipe and Foun-

dry were represented by six Unions (including the Petitioners) at its Bessemer, Alabama facility.

These labor organizations negotiated the wages, hours, terms and conditions of employment, including seniority rights, for the employees whom they represented in the various bargaining units. The seniority rights of the employees were contained in separate collective bargaining agreements with the various Unions.

Rather than there being one seniority system at the Bessemer plant, there were several independent systems operating simultanously. The Fifth Circuit, in finding the Petitioners' seniority systems non bona fide, considered all of the systems as a whole, and ignored the independent nature of the Petitioners' systems. This approach flies in the face of § 703 (h) and the Supreme Court's ruling in *Teamsters* v. *United States*, 431 U.S. 324 (1977).

This approach by the Fifth Circuit raises serious questions of national labor policy since the otherwise bona fide character of the Petitioners seniority systems was held to be tainted by the unlawful acts of the employer and other Unions at the plant; acts to which the Petitioners were not parties and over which they had no control.

As stated in *Teamsters, supra*:

> Although a seniority system inevitably tends to perpetuate the effects of pre-Act discrimination in such cases, the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act.
>
> 431 U.S. at 352-53

It follows that since unilateral employer pre-Act discrimination will not defeat the bona fide character of a seniority

system, the acts of the employer and *other* Unions should not serve to defeat the bona fide nature of the non-offending labor Unions systems.

For example, the Fifth Circuit placed great weight on the 1950 transfer of employees in the Steelworkers, Boilermakers and Machinists' units, and attributed the racial motivation of these transfers to the seniority systems maintained by the Petitioners, even though the Petitioners were not involved in the transfers and the transfers had no relation to the seniority systems maintained by the Petitioners.

The Court concluded that "the 1950 racial 'swap' of positions, in defiance of all reason, reinforces the conclusion that the Bessemer seniority system was created and maintained unlawfully". 644 F.2d at 1119 (App. A, 18a).

In effect, the Fifth Circuit used the racially motivated actions of U.S. Pipe, the Steelworkers, Boilermakers and Machinists to infer discriminatory intent by the Petitioners in their separately maintained seniority systems. This type of analysis completely disregards the holding of the Supreme Court in *Teamsters*, and the legislative history contained there, that innocent employees will not lose their seniority rights "simply because their employer engaged in discrimination prior to the passage of the Act". 431 U.S. at 253.

Had the Fifth Circuit reviewed each collectively bargained seniority system independently, it could not have found that Petitioners' systems were "the result of an intention to discriminate because of race" as required by § 703(h) of the Act. In its opinion the only reference to the Petitioner Molders seniority system was a factual conclusion by the Fifth Circuit that the Molders "segregated the few blacks in their Alabama locals". 644 F.2d 1119 (App. A, 19a). However, there was no finding that this occurred at the Bessemer facility and it is difficult to see the relationship between this finding and the seniority system negotiated at Bessemer by the Molders.

With regard to the Petitioner Patternmakers, again there is an isolated reference to a racial slur attributed to the Union. There is no analysis of how this statement had any relation to the seniority system negotiated by the Patternmakers at Bessemer.

To further demonstrate the approach taken by the Fifth Circuit in considering all the independently negotiated systems as one the Court held that the District Court erred in failing to "recognize the cumulative effect of separate pieces of evidence of racial motives . . ." (App. A, 20a).

The danger in the approach taken by the Fifth Circuit is that it blurs the firmly entrenched distinctions between bargaining units and their exclusive bargaining representatives. The concept of the bargaining unit and the exclusive representative status of the Union selected by employees in that unit is the cornerstone of our national labor policy as expressed in the Labor Management Relations Act, 29 U.S.C. § 159(a) which states in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

Thus, an employer may not bargain with anyone purporting to represent employees other than the representatives selected. *NLRB* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937); *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944).

To view all Unions, bargaining units and collective bargaining agreements associated with a single employer as a unit, without making the distinctions created by national labor policy, is a judicial revocation of the fundamental law of collective bargaining, and places an unjust burden and responsibility on labor organizations to correct historic discriminatory practices of employers and other Unions.

There is nothing in the legislative history of Title VII, particularly § 703(h), which supports the approach taken by the Fifth Circuit, nor has the Supreme Court held that in § 703(h) cases the operation of the Labor Management Relations Act is suspended. In fact, it appears from the legislative history of § 703(h) that this is precisely what Congress intended to protect.

In *Teamsters*, there was but one bargaining agent involved, although it was the exclusive representative for more than one bargaining unit. Since the Teamsters were the agent for all the employees there was no conflict with national labor policy in examining the various contracts negotiated by the Union together. In fact, the significance of the bargaining unit is noted at footnote 41 where the Court states:

> In addition, there is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems.

431 U.S. at 354 n. 41

The misapplication of *Teamsters* to examine the seniority systems of the Molders and Patternmakers, and the fundamental disregard of federal labor policy evidenced by this action warrants review by this Court.

## III. The Federal Court Of Appeals Is Bound By The Clearly Erroneous Rule Of Federal Rules Of Civil Procedure 52(a) In Reviewing The District Court's Findings Of Fact As To Motivation Of Parties Who Negotiated The Seniority System.

Rule 52(a), Federal Rules of Civil Procedure, provide in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses . . .

This Court has applied this "clearly erroneous" rule to cases where intent to discriminate has been found. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 539 (1979). Employment discrimination has been found to be a question of mixed fact and law subject to the clearly erroneous standard of review of Rule 52(a). *Manning* v. *Trustees of Tufts College*, 613 F.2d 1200, 1203 (1st Cir. 1980). This standard is particularly applicable in a discrimination case where the credibility of witnesses is an essential factor of a decision. *Marshall* v. *Kirkland*, 602 F.2d 1282, 1294 (8th Cir. 1979). However, even where a finding is based upon documentary evidence or undisputed facts, the clearly erroneous rule applies. *Local Union 1219, United Bhd. of Carpenters* v. *United Bhd. of Carpenters*, 493 F.2d 93 (1st Cir. 1974).

The Court of Appeals did not state its exact standard of review on factual matters but based its holdings on the standards used in *Swint* v. *Pullman Standard*, 624 F.2d 525 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (April 20, 1980). In *Swint*, the Court refused to apply the clearly erroneous standard because a finding of discrimination is a finding of ultimate fact. *Id.* at 533 n. 6. The Fifth Circuit apparently used the broader standard in this case. It found that the seniority system was not neutral, contrary to the finding of

the District Court (App. A, 19a). It also stated that intention to discriminate in negotiations was based partly on scattered phrases throughout the trial without explaining that it found the District Court's finding that there was *no intention* to discriminate clearly erroneous (App. A, 20a).

The District Court had sufficient opportunity to determine the facts during the lengthy trial and seven years of pretrial procedures. The case, like *Brinkman*, revolved around motivation and intent of the parties, both past and present, which the trier of fact was in the best position to determine.

Under the standards set forth in Rule 52(a) the Court must explain why the findings are clearly erroneous and not adopt its own standard of review.

This Court should review this breach of the Federal Rules not only as an exercise in supervisory powers but to resolve a conflict among the Circuits as to the correct standard of review.

## CONCLUSION

The United States Court of Appeals has refused to accept this Court's reversal of its decision in *Teamsters* v. *United States*. The grant of certiorari in *Swint* v. *Pullman* demonstrates that the direction of that Circuit's thought on § 703(h) bona fide seniority systems must be reviewed. The differing views of the Fourth and Sixth Circuits verify that review is warranted.

The treatment of the Molders and Patternmakers is further evidence that the Petition for Certiorari should be granted. The 1950 swap of jobs between the Machinists, Boilermakers and Steelworkers had nothing to do with these Petitioners. Yet the "swap" served as the linchpin of the Fifth Circuit's reversal of the District Court on the issue of other Union liability. This Court should determine where the lines will

be drawn on the application of *Teamsters* to their seniority system under § 703(h) and federal labor policy.

Lastly Rule 52(a) of the Federal Rules of Civil Procedure has been ignored in this Circuit. Again, following the lead of the grant of certiorari in *Swint* v. *Pullman*, the present Petition should also be granted.

Respectfully submitted,

.....
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## CERTIFICATE OF SERVICE

I hereby certify that three true and exact copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon the following persons by ordinary United States mail this ..... day of December, 1981:

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# Appendix

# APPENDIX

## SUPREME COURT OF THE UNITED STATES

No. A-319

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION LOCAL 342; AND PATTERN MAKERS LEAGUE OF BIRMINGHAM,
Petitioners,

v.

JOSEPH TERRELL, ET AL.

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 7, 1981.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 19th day of October, 1981.

## STATUTES AND RULE INVOLVED

Section 703(a), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a) provides as follows:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunity or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(c) provides as follows:

> (c) It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or

as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(h), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(h) provides in pertinent part as follows:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, . . .

Section 706(g), Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(g) provides as follows:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the per-

> sons or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

The Civil Rights Act of 1866, 42 U.S.C. § 1981 provides in pertinent part as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 52(a), F.R.Civ.P., provides in pertinent part:

> . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . .

# Opposition

Nos. 81-1029, 81-1118

Office - Supreme Court, U.S.
FILED
JAN 26 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, *et al.*,

*Petitioners,* No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *et al.*,

*Petitioners,* No. 81-1118

v.

JOSEPH TERRELL, JR., *et al.*,

*Respondents,* Nos. 81-1029
81-1118

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals properly ruled that a seniority system which perpetuates the effects of racial job segregation is unlawful in violation of Title VII of the Civil Rights Act of 1964 because it is not a "bona fide" seniority system where the system severely limited the employment opportunities of black workers, the system was developed by unions with overtly discriminatory practices, the system was gerrymandered in an irrational manner, the development of the system was affected by racial considerations, the historically all-white unions at the plant rejected the bargaining proposals made from 1968 through 1977 by a predominantly black union and the company to institute a seniority system which would end the

racially discriminatory operation of the system, and union officers of the historically all-white unions demonstrated clear racial bias during the period when these unions rejected efforts to establish a nondiscriminatory seniority system.

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Nos. 81-1029, 81-1118

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, LOCAL 342, et al.,
Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.
Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., et al.,
Respondents, Nos. 81-1029
81-1118

---

# BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

This fair employment action was filed on October 16, 1972, alleging that United States Pipe and Foundry and 12 unions which represented employees at the Company's

Bessemer, Alabama plant engaged in systematic discrimination in job assignment, training and promotion of black employees in violation of Title VII of the Civil Rights Act of 1964 (as amended 1972) and 42 U.S.C. §1981. On the eve of trial, following extensive discovery, all parties to the litigation agreed upon injunctive relief, including modification of the seniority system at the plant. Also the plaintiffs and the company entered into a separate agreement including the payment of $510,000 in back pay in settlement of all the monetary claims against it by the class members. The plaintiffs also agreed not to seek back pay against the International Brotherhood of Electrical Workers, Local 136.[1/]

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1/ Summary Judgment had been granted in favor of the International Brotherhood of Electrical Workers and no appeal was taken from that Judgment.

The issue reserved for trial was the monetary liability of the remaining five international unions and their five locals at the Bessemer plant. The plaintiffs stated that they were not seeking to introduce evidence with the intent of establishing that the United Steelworkers of America and its Local 2140 had liability for back pay. However, the plaintiffs maintained that if the other eight unions, hereinafter referred to collectively as the "AFL" unions,[2/] introduced evidence that demonstrated that the Steelworkers were liable for back pay, then the plain-

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2/ The contested representational elections in the 1940s at the Bessemer plant--which are relevant to the issue presented for review, the legality of the seniority system--involved disputes between unions belonging to the American Federation of Labor and the Steelworkers which belonged to the Congress of Industrial Organizations.

tiffs would request that the Steelworkers be assessed the liability established by the AFL Unions.[3/]

The critical issue raised in the petitions for certiorari filed by the eight AFL Unions[4/] is whether the seniority system to which they were parties was created or maintained with the intention to discriminate. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Black employees had been assigned on the basis of race to poorly paid "dead

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3/ All ten unions were represented by the same counsel in the district court. On appeal in the Fifth Circuit the AFL Unions and the Steelworkers were separately represented.

4/ Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers and its Local 583; International Association of Machinists and Aerospace Workers and its Lodge 359; International Molders and Allied Workers Union and its Local 342; Patternmakers League of North America and its affiliate, Patternmakers Association of Birmingham.

end" jobs. The separate seniority units into which employees were segregated largely coincided with the distinct bargaining units represented by each of the AFL Unions and the Steelworkers. The AFL Unions were virtually all-white whereas the Steelworkers, which represented the poorly paid black workers, was predominantly black. Under the pre-settlement seniority system an employee's seniority was based upon service in a particular department or seniority unit, rather than service at the plant. Since a black worker with years of service in a poorly paid black seniority unit necessarily forfeited his seniority upon transferring to a traditionally white job, the seniority system effectively locked blacks into positions to which they had been assigned

on the basis of race. The plaintiffs alleged that the system was designed and maintained with the purpose of discriminating against black workers.

The district court held that a part of the seniority system was created with an intent to discriminate. The district court determined that the transfer in 1950 of 10 positions staffed by whites from the Steelworkers' unit to the Boilermakers' and Machinists' units in exchange for all of the black workers represented by the Boilermakers and Machinists was "not... rational" and "that inconsistent approaches [were] taken with respect to helper positions - separating some (those with black incumbents) from their related skilled positions, while joining others (those with white incumbents) to their related skilled

positions." App. 19b.[5/] Although finding that the seniority system was "instituted at a time of widespread racial discrimination--in the plant [and] in the unions [footnote omitted]", App. 20b, that "racial considerations were involved in the 1940 [union] elections which produced the bargaining units," App. 20b, and that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 [collective bargaining] negotiations....," App. 23b, the district court concluded that the seniority system -- apart from the 1950 transfers -- was not created or maintained with an intent to discriminate, App. 25b.

The court of appeals ruled that, as a matter of law, the substantial adverse racial effect of the system, the "avowedly

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5/ The reference is to the Appendix to Petition for a Writ of Certiorari, No. 81-1118.

racist policies of the craft [AFL] unions," the genesis of the system in intentional discrimination, and the racially oriented collective bargaining negotiations compelled the conclusion that the seniority system was not bona fide since it resulted from and was continued with the purpose of intentional discrimination. App. 16a-20a. The appellate court held that the Boilermakers, Machinists, Molders, and Patternmakers and their local affiliates were liable for the economic harm suffered by black workers as a consequence of the non-bona fide and illegal seniority system.[6/]

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6/ In view of the repeated efforts by the Steelworkers to persuade the company and the AFL Unions to adopt a non-discriminatory seniority system, the court of appeals "absolve[d] the Steelworkers from any responsibility under Title VII for the discriminatory seniority system at the Bessemer plant." App. 24a-25a. Neither the AFL Unions nor the plaintiffs have petitioned this Court to reverse this specific holding.

REASONS FOR DENYING THE WRIT

1. A seniority system which perpetuates the effects of racial job segregation is unlawful if differences in treatment under the system are "the result of an intention to discriminate because of race...." 42 U.S.C. §2000e-2(h). Teamsters, 431 U.S. at 353. This Court has observed that in "[d]etermining whether invidious discriminatory purpose was a motivating

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6/ continued)

The court of appeals further held that only the local unions were named in the original 1969 administrative charges filed with the Equal Employment Opportunity Commission. Thus the court ruled that while the liability of the local unions commenced with the filing of the 1969 charges, the liability of the four international unions commenced with the filing of amended charges in 1973. App. 30a-31a. The plaintiffs have filed a petition for a writ of certiorari, Terrell, et al. v. International Association of Machinists, et al., No. 81-1069, presenting the question of whether the 1969 charges, properly construed, adequately named the international unions.

factor [it is necesssary to make] a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). Thus, a court's determination of whether an intent to discriminate entered the establishment or maintenance of a seniority system depends upon the particular factual context in a specific plant. The union petitioners essentially argue that the Teamsters standard was improperly applied by the court of appeals to the particular factual context of the Bessemer, Alabama plant of United States Pipe and Foundry Company. The writ of certiorari should not be granted. It is not the role of this Court to sit as a second-tier appellate court "review[ing] the evidence and discuss[ing] specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925).

2. The court of appeals correctly applied the legal standards in determining that "the Bessemer system cannot qualify for the immunity extended by section 703(h) of Title VII only to those seniority systems created and maintained without intention to discriminate." App. 20a-21a. The union petitioners fail to describe adequately the record of intentional discrimination in the creation and maintenance of the system.

a. Origin of the system. The seniority system during the period at issue, from the mid-1960s to the entry of settlement in 1979, was created during the period from 1939 through 1950. The period included two contested bargaining unit elections and a transfer of jobs between

bargaining units. The evidence overwhelmingly demonstrates that the system was created with an intent to discriminate. First, the AFL Unions which were instrumental in the creation of the system were openly racist.

> ...the Machinists barred blacks from union membership. The Boilermakers relegated blacks to inferior "auxiliary" locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no "qualified niggers" in the state.

App. 19a.[7/] Second, the union elections

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7/ The district court also found that there was "widespread racial discrimination ... in the [AFL] unions...." App. 16b, 20b. The Boilermakers and Machinists, Petition No. 81-1118, p.7, n.6, wrongly dispute the findings of both lower courts by asserting that the Machinists and Boilermakers had had black members and officers in the 1940s and 1950s. For example, they refer to the testimony of Hembree that he was a local officer in the Boilermakers, apparently in the mistaken belief that Hembree is black. In fact, the transcript indicates that Hembree is white. (June 1979 Trial Transcript, p. 300).

in 1940 "had racial implications." App. 16b. Third, while the National Labor Relations Board included black-held jobs within the bargaining units of the Machinists and Boilermakers, these unions subverted the NLRB certification by failing to represent the black workers.[8/] Fourth, the subversion of the NLRB certification was completed by a 1950 transfer of jobs between the Steelworkers and the boilermakers and Machinists: the trial and appellate courts both held that this transfer was racially motivated, see p. 6, supra.[9/]

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8/ At first the Machinists segregated the black workers who attended union meetings and then they told the blacks that "they couldn't represent [blacks]." Transcript, p. 230.

9/ The transfer agreement expressly referred to race--"Millwright Helpers (white)," "Helpers (white)," App. 4i. Nevertheless, the Machinists and Boilermakers contend that the holding by the two

Fifth, in 1949 the Molders petitioned the NLRB to certify a unit composed of the only two jobs in the Foundry department which were staffed exclusively by white workers; the Molders rejected the inclusion of helper positions, staffed by blacks, which were functionally related to the white-only jobs included in the unit. Sixth, the constitutions of the Boilermakers, Machinists and Molders provided for the representation by these unions of workers in helper and related production jobs. However, these unions rejected the inclusion in their bargaining units in the Bessemer plant of helper and related production jobs which were staffed by

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9/ continued

lower courts that the 1950 transfer was racially motivated is a "subsidiary ruling" which requires review. Petition, No. 81-1118, pp. 21-22.

blacks. Seventh, as the district court found, "inconsistent approaches are taken with respect to helper positions....those with white incumbents [unlike those with black incumbents] were joined by the AFL Unions to their related skilled positions." App. 19b.

Finally, as a result of a decade of manipulation, the goal of segregation was attained; after the 1950 job transfers, the bargaining units of the AFL Unions were staffed exclusively by white workers.

b. Maintenance of the System. The racial segregation established by the creation of the seniority system was maintained by the seniority forfeiture or "seniority suicide" provisions in the collective bargaining agreements--if an employee transferred from a job in the unit represented by one union to a job in a unit

represented by another union, he forfeited all his accumulated seniority. In a lay-off he would be the first worker in the unit to lose his job. As both lower courts found, black workers were adversely affected by the seniority system since black workers had been isolated into the lower-paying jobs in departments which provided little opportunity for promotion.[10/]

This racially based and discriminatory seniority system was maintained with an intent to discriminate. App. 18a.[11/] First,

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10/ For example, in 1971 only 4.2% or 11 out of 262 workers in the seniority units represented by the AFL Unions were black, whereas 78.8% or 404 out of 513 workers in the seniority units represented by the Steelworkers were black. Plaintiffs exhibits 28d, 78.

11/ The district court found that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority...." App. 236. However, the court concluded that the resistance of the AFL Unions to

in collective bargaining sessions with the AFL Unions during the period from 1968 through 1977, the company proposed modifications in the seniority system which would have reduced or terminated the adverse racial consequences of the system. The AFL Unions adamantly refused any modifications in 1968 and 1971 and agreed to only minor modifications in 1975 and 1977. Second, the Steelworkers in meetings of the union representatives proposed that the unions all agree to a seniority system which would finally end the effects of racial segregation. The Steelworkers' representative testified that the proposal

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11/ continued

change was not based upon intentional discrimination. The district court erred in failing to make "a sensitive inquiry into" the overwhelming circumstantial and direct evidence of discrimination. Arlington Heights, 429 U.S. at 266.

ran into a "brick wall"--the AFL Unions' intransigence. Transcript, pp. 111-12.

Third, during the period when the AFL Unions refused to modify the racially discriminatory seniority system, it was apparent that local union officers were racially biased.[12/] Fourth, at least the Patternmakers violated its own procedures when it failed, as did the other AFL Unions, to agree to any modification of

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12/ In an affidavit submitted in 1969 to the EEOC, the president of Molders Local 362 stated with respect to a black in the union that "[a]s long as he stays in his place, he's alright with me." Plaintiffs' exhibit 70. The president also informed black workers that "[w]e didn't want you all in here to start with" and he refused to represent black workers in grievance disputes. Transcripts, pp. 191-96. A business manager of the Patternmakers Association of Birmingham told an EEOC investigator that "there were no qualified niggers." Transcript, pp. 410, 473, see 438-39.

the seniority system in 1971. The international representative testified that he participated in the 1971 negotiations, that the membership had agreed to the proposal providing for inter-union transfer, and that the proposal "absolutely" should have been included in the collective bar gaining agreement. Transcript, pp. 426-28. When the representative was shown on the stand that the proposal had not been included in the agreement, he testified that he was "greatly disturbed" and that the failure to include the provision was "a violation of our bylaws." Transcript, pp. 429, 462. The Steelworkers' representative testified that the AFL Unions did not discuss why they refused to modify the discriminatory seniority system in 1971. Plaintiffs' exhibit 47, p.45.

Despite the efforts of the company and the Steelworkers to modify the seniority system, the system remained discriminatory because of the resistance of the AFL Unions until the entry of the settlement agreement in 1980. .

3. The decision of the appellate court is limited to this unique and specific factual record. The evidence of intentional discrimination is based upon a particular history of interaction over a period of 40 years between eight AFL Unions, the Steelworkers and United States Pipe and Foundry Company. The appellate decision based upon this particular factual record does not present issues of law of any general importance which may be applicable to resolve issues arising in other factual

contexts.[13/]

4. The appellate court applied the proper standard in evaluating whether the findings of the district court were clearly

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13/ Contrary to the assertion of petitioners, No. 81-1118, p. 19, the appellate decision does not conflict with the decisions of the Fourth, Sixth or District of Columbia Circuits. In Patterson v. American Tobacco Company, 634 F.2d 744, 750, n.6 (4th Cir. 1980), cert. granted on other grounds, No. 80-1199, the Fourth Circuit specifically approved the Fifth Circuit's application of Teamsters: "For guidance in addressing the issue [bona fides of a seniority system] the district court may find helpful the Fifth Circuit's decision in James v. Stockham Valves & Fittings Co., 559 F.2d 310, 350-53 (5th Cir. 1979)." Similarly, the Sixth Circuit has specifically approved the approach taken by the Fifth Circuit in James. Equal Employment Opportunity Commission v. Ball Corp., 661 F.2d 531, 539 (1981); Taylor v. Mueller Co., 26 FEP Cases 1695, 1699-1700 (1981). The decision of the District of Columbia Circuit cited by petitioners, United States v. Trucking Employers, Inc., 561 F.2d 313 (1977), did not decide the issue of the bona fides of a seniority system and did not, in any way, conflict with the decisions of the Fifth Circuit.

erroneous. The court concluded that "the totality of circumstances surrounding the creation and maintenance of the seniority system ... 'leaves us with the definite and firm conviction that a mistake has been made....'" App. 20a. See United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The appellate court applied the proper standard. There is no issue properly raised concerning the application of Rule 52(a), Federal Rules of Civil Procedure, other than the question of whether on this particular record the specific conclusions of the appellate court were correct. These conclusions were correct, see pp. 11-20. In any case, it is not appropriate to grant a petition in order for this Court to sit as a second-tier appellate court to review specific findings and conclusions which have no general importance and which

do not conflict in any way with the decisions of the other circuit courts.

## CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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